Abdul Salam bin Husin v Majlis Angkatan Tentera & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–99 OF 1999
ZALEHA ZAHARI, AHMAD MAAROP AND SULAIMAN DAUD JJCA
8 JULY 2009

Administrative Law — Rights and liabilities of public servants — Action against government — Lieutenant's commission with Royal Malaysian Air Force cancelled — Whether right of being heard should be given — Whether Royal prerogative to cancel commission of officer of armed forces — Armed Forces Act 1972 s 9 — Federal Constitution arts 132(1) & 135

Armed Forces — Appeal — Appeal against decision of Armed Forces Council — Lieutenant's commission with Royal Malaysian Air Force cancelled — Whether right of being heard should be given — Armed Forces Act 1972 s 9 — Federal Constitution arts 132(1) & 135

Constitutional Law — Public servants — Dismissal — Lieutenant's commission with Royal Malaysian Air Force cancelled — Whether in accord with constitutional provisions — Whether right of being heard should be given — Whether Royal prerogative to cancel commission of officer of armed forces — Armed Forces Act 1972 s 9 — Federal Constitution arts 132(1) & 135

The first respondent ('the council') decided to recommend to the Yang di-Pertuan Agong the cancellation of the appellant's commission as a lieutenant in the Royal Malaysian Air Force ('RMAF'). The appellant alleged that by a letter dated 7 May 1986 he was informed that the council had made a decision, subject to the Yang di-Pertuan Agong's assent, that his commission will be cancelled with effect from 31 May 1986 pursuant to s 9 of the Armed Forces Act 1972 ('the Act'). The cancellation of the appellant's commission was subsequently published in the Federal Government *Gazette* ('the *Gazette*'). The appellant commenced the present action claiming declarations that the cancellation of his commission was null and void and of no legal effect. The learned High Court judge dismissed his claims, and hence this appeal. The appellant contended that the council not only made the decision to cancel the appellant's commission but also fixed the date for that purpose, namely, 31 May 1986 and as such the purported cancellation of the appellant's commission was made in contravention of s 9 of the Act and

A therefore null and void. It was also submitted that the council had breached the rules of natural justice by not giving the appellant the opportunity to be heard before making the recommendation to cancel the appellant's commission to the Yang di-Pertuan Agong.

B

Held, dismissing the appeal with costs:

(1) (per **Zaleha Zahari JCA**) The power to cancel an officer's commission 'at any time without assigning any reasons' is in accord with the C constitutional provisions. The cancellation of the commission of an officer of the armed forces is at the will and pleasure of the Yang di-Pertuan Agong. The court has no jurisdiction to inquire into circumstances under which the appellant ceased to hold office. The fact that the appellant had not been given an opportunity of being heard D was consistent with the tenure and terms of his service (see paras 8 & 9).

(2) (per **Sulaiman Daud JCA**) There was nothing in the said letter that could be construed as a notification to the appellant of the cancellation of his commission, or the termination of his service, as an officer of the E armed forces as the letter was not addressed to the appellant. The cancellation of the appellant's commission was made by the Yang di-Pertuan Agong in exercise of his powers under s 9 of the Act as evidenced by the said *Gazette* notification (see paras 18 & 19).

(3) (per **Sulaiman Daud JCA**) The power to cancel a commission of an F officer under s 9 of the Act has to be read with arts 132(2A) and 135(2) of the Federal Constitution. It is implicit from the provision of art 135(2) that the restriction on the dismissal and reduction in rank of members of the public services without being given the right to be heard does not apply to members of the armed forces. The exclusion of G the members of the armed forces from being afforded the right to be heard under art 135(2) applies to all stages of the termination process, including the proceedings before the Council (see para 26).

(4) (per **Sulaiman Daud JCA**) Under the Act, the power to cancel the H appellant's commission is vested in the Yang di-Pertuan Agong, and it is a right exercisable at his discretion at any time without assigning any reason. The Yang di-Pertuan Agong had exercised the power conferred upon him and assented to the cancellation of the appellant's commission. It was not open for the court to make further inquiry on I the propriety of the said cancellation (see para 30).

[Bahasa Malaysia summary

Responden pertama ('Majlis') memutuskan untuk mencadangkan

pembatalan pentauliahan perayu sebagai leftenan Tentera Udara Diraja Malaysia ('TUDM') kepada Yang di-Pertuan Agong. Perayu mendakwa bahawa melalui surat bertarikh 7 Mei 1986 dia dimaklumkan bahawa Majlis telah membuat keputusan, bergantung kepada persetujuan Yang di-Pertuan Agong, bahawa pentauliahannya akan dibatalkan berkuatkuasa sebelum 31 Mei 1986 menurut s 9 Akta Angkatan Tentera 1972 ('Akta'). Pembatalan pentauliahan perayu kemudiannya diterbitkan dalam Warta Kerajaan Persekutuan ('Warta'). Perayu memulakan tindakan ini menuntut satu deklarasi bahawa pembatalan pemtauliahannya adalah batal dan tidak sah dan tidak mempunyai kesan undang-undang. Hakim Mahkamah Tinggi yang bijaksana menolak tuntutannya, dan oleh itu rayuan ini dibuat. Perayu menghujah bahawa Majlis bukan sahaja membuat keputusan untuk membatalkan pentauliahan perayu tetapi juga menentukan tarikh untuk tujuan tersebut, iaitu, 31 Mei 1986 dan oleh itu pembatalan pentauliahan perayu yang dibuat bercanggah dengan s 9 Akta dan oleh itu adalah batal dan tidak sah. Ia juga menghujah bahawa Majlis telah melanggar peraturan-peraturan keadilan asasi dengan tidak memberikan peluang untuk didengar sebelum membuat cadangan untuk membatalkan pentauliahan perayu kepada Yang di-Pertuan Agong.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Zaleha Zahari HMR**) Kuasa untuk membatalkan komisyen pegawai 'at any time without assigning any reasons' adalah menurut peruntukan-peruntukan perlembagaan. Pembatalan pentauliahan seorang pegawai angkatan tentera adalah mengikut budi bicara Yang di-Pertuan Agong. Mahkamah tidak mempunyai bidang kuasa untuk menyiasat mengenai keadaan di mana perayu tidak lagi memegang jawatan tersebut. Fakta bahawa perayu tidak diberikan peluang untuk didengar adalah konsisten dengan tempoh memegang jawatan dan terma-terma perkhidmatannya (lihat perenggan 8 & 9).

(2) (oleh **Sulaiman Daud HMR**) Tidak terdapat apa yang dapat ditafsirkan sebagai makluman kepada perayu mengenai pembatalan pentauliahannya, atau pembatalan perkhidmatannya, sebagai pegawai angkatan tentera di dalam surat tersebut memandangkan surat tersebut tidak ditujukan kepada perayu. Pembatalan pentauliahan perayu dibuat oleh Yang di-Pertuan Agong menggunakan kuasanya di bawah s 9 Akta sepertimana yang dibuktikan melalui makluman Warta tersebut (lihat perenggan 18 & 19).

(3) (oleh **Sulaiman Daud HMR**) Kuasa untuk membatalkan pentauliahan seorang pegawai di bawah s 9 Akta perlu dibaca dengan perkara 132(2A) dan 135(2) Perlembagaan Persekutuan. Adalah tersirat daripada peruntukan perkara 135(2) bahawa sekatan terhadap

pemecatan dan penurunan pangkat anggota-anggota perkhidmatan awam tanpa diberi peluang untuk didengar tidak dapat digunakan ke atas anggota-anggota angkatan tentera. Pengecualian anggota-anggota angkatan tentera daripada diberikan hak untuk didengar di bawah perkara 135(2) dikenakan pada semua peringkat proses pemecatan, termasuk prosiding Majlis (lihat perenggan 26).

(4) (oleh **Sulaiman Daud HMR**) Di bawah Akta, kuasa untuk membatalkan pentauliahan perayu terletak pada Yang di-Pertuan Agong, dan hak ini boleh digunakan mengikut budi bicara baginda tanpa memberikan sebarang alasan. Yang di-Pertuan Agong telah menggunakan kuasa yang diberikan kepadanya dan memperkenankan pembatalan pentauliahan perayu. Mahkamah tidak dibenarkan untuk membuat siasatan lanjut ke atas pembatalan tersebut (lihat perenggan 30).]

Notes

For a case on appeal under armed forces generally, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 1571.

For cases on action against government, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 711–714.

For cases on dismissal of public servants, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2281–2290.

Cases referred to

Bugdaycay v Secretary of State for Home Department [1987] 1 All ER 940, HL (refd)

Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61, SC (refd)

Tufnell, Re (1876) 3 Ch D 161 (refd)

Ridge v Baldwin [1964] AC 65, HL (refd)

Legislation referred to

Armed Forces Act 1972 s 9

Federal Constitution arts 132(1), (2), (2A), 135, 135(1), (2)

Appeal from: Civil Suit No S6–21–218 of 1989 (High Court, Kuala Lumpur)

Karpal Singh (Sangeet Kaur with him) (Karpal Singh & Co) for the appellant.

Narkunavathy Sundareson (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Zaleha Zahari JCA:

[1] I have read the judgment of my brother, Sulaiman bin Daud JCA, in draft and agree with the said judgment. In addition I would like to add the following.

[2] This appeal raises an important question, whether an officer in the armed forces is entitled to a right to be heard before a decision is made to cancel his commission as a member of the armed forces?

[3] It is common ground that the appellant, as an officer in the armed forces, is governed by the Armed Forces Act 1972 ('the Act'). The fact that the appellant was not given an opportunity of being heard by the Armed Forces Council ('the Council') prior to making their decision to recommend to the Yang di-Pertuan Agong to make a decision under s 9 of the Act, is an admitted fact. It is also common ground, on the facts of this case, the appellant was not put to notice as to the ground upon which the Council's recommendation to the Yang di-Pertuan Agong was based.

[4] It was argued on behalf of the appellant that it was incumbent upon the Council to issue a notice to the appellant stating the grounds upon which the Council would be making a recommendation to the Yang di-Pertuan Agong to make a decision under s 9 of the Act and the appellant be given an opportunity to be heard at that stage of the proceedings. The appellant's counsel submitted that as the Council had failed to issue such a notice, and the appellant accordingly denied the opportunity of being heard at the pre-recommendation stage, the decision of the Yang di-Pertuan Agong based on such a recommendation was accordingly null and void.

[5] It is important to get our perspective right on this issue. The rule of natural justice vary in content and ambit according to the circumstances and context. On the facts of this case the following constitutional provision applies. Articles 132(1) and 135 of the Federal Constitution states:

132(1) For the purpose of this Constitution, the public services are —

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the public force;

(e) (repealed)

(f) the joint public services mentioned in Article 133;

(g) the public service of each State;

(h) the education service.

135(1) No member of any of the services mentioned in paragraph (b) to (h) of clause (1) of Article 132 shall be dismissed or reduced in rank by any authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank;

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

[6] The High Court judge rules that the omission of the public service of the 'armed forces' in art 135(1) for the purpose of conferring a right of being heard to members of services specifies in art 132(1), means only members of the public services specified in paras (b)–(h) is to be accorded with the right of the opportunity of being heard. The High Court judge was certainly right in arriving at such a conclusion. It was clearly not for the court to engraft such a right conclusion. It was clearly not for the court to engraft such a right to officers of the armed forces in view of the clear legislative intent to exclude the officers from such a service from enjoying such a right.

[7] The fact that an officer in the armed forces is not entitled to a right of being heard is fortified by the provisions of s 9 of the Act which the appellant, as an officer of the armed forces, is also subject to. Section 9 states:

> The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council *at any time without assigning any reason therefor* cancel any commission granted under the provisions of the Part. (Emphasis added.)

[8] This power to cancel an officer's commission 'at any time without assigning any reasons' (which power was exercisable not necessarily in relation to cases of misconduct) is in accord with the constitutional provisions. As far as the discipline of the armed forces, the legislative intent is clear and unambigious. An officer in the armed forces is at the will and pleasure of the Yang di-Pertuan Agong. In such a situation the court clearly has no jurisdiction to inquire into circumstances under which the appellant ceased to hold office.

[9] The fact that the appellant had not been given an opportunity of being heard was, in the circumstances of this case, consistent with the tenure and terms of his service. The High Court judge was right in finding that the

cancellation of the appellant's commission by the Yang di-Pertuan Agong to be valid and of full legal effect and in dismissing the appellant's claim with costs.

Sulaiman Daud JCA:

[10] The appellant was at all material times a lieutenant in the Royal Malaysian Air Force ('RMAF'). The first respondent, the Armed Forces Council ('the Council'), is responsible for the command, discipline and administration of the armed forces.

[11] At its meeting on 27 March 1986, the Council decided to recommend to the Yang di-Pertuan Agong the cancellation of the appellant's commission as a lieutenant in the RMAF. The appellant alleged that by a letter dated 7 May 1986, he was informed that the Council has made a decision, subject to the Yang di-Pertuan Agong's assent, that his commission will be cancelled with effect from 31 May 1986 pursuant to s 9 of the Armed Forces Act 1972 ('the Act'). The cancellation of the appellant's commission was subsequently published in the Federal Government *Gazette* No 5438 dated 28 August 1986 ('the said *Gazette*').

[12] The appellant commenced the present action claiming declarations that the cancellation of his commission was null and void and of no legal effect, and that he remained an officer in the RMAF. He also claimed for damages and for an account be taken of all the salaries, emoluments and benefits due to him. The learned High Court judge dismissed his claims, and hence this appeal.

[13] The appellant raised six grounds in the memorandum of appeal, but before us his learned counsel confined his submission on two grounds which are as follows:

(a) that the learned trial judge was wrong in not concluding there had been a contravention of s 9 of the Act; and

(b) that the learned trial judge was wrong in not holding the decision-making process leading to the cancellation of the appellant's commission was fatally flawed.

WHETHER THERE WAS CONTRAVENTION OF S 9

[14] The cancellation of a commission granted to an officer of the armed forces is governed by s 9 of the Act which provides as follows:

A Cancellation of commission

9.) The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefor cancel any commission granted under the provision of this Part.

B

[15] Mr Karpal Singh, for the appellant, pointed out that the aforesaid provision only empowered the Council to make recommendation to the Yang di-Pertuan Agong to cancel the commission of an officer. However, he C argued, in the present case the Council not only made the decision to cancel the appellant's commission but also fixed the date for that purpose, namely, 31 May 1986. By reason thereof, he submitted that the purported cancellation of the appellant's commission was made in contravention of s 9 of the Act, and therefore null and void and of no legal effect.

D

[16] Ms Narkunavathy, senior federal counsel, contended that the letter dated 7 May 1986 referred to by learned counsel was not written by the Council to the appellant as a notification of the cancellation of his commission. She pointed out the letter was written by one Major Zulkafli bin E Mohd Nor, on behalf of 'Panglima Tentera Udara' to 'Jabatanarah Rekod dan Pencen' directing the department to prepare the necessary documentations for the purpose of such a cancellation. Learned senior federal counsel further contended that the decision made by the Council on 27 March 1986 was but a recommendation that the appellant's commission be cancelled which was F subject to the assent of the Yang di-Pertuan Agong.

[17] As the appellant's case rests on the letter dated 27 March 1986, I find it convenient to reproduce the relevant parts of the letter which are as follows:

G SULIT DARIHAL ANGGOTA

CTC

KEMENTAH

50634 KUALA LUMPUR H

KL 2921333 Samb 4497

7 Mei 1986

DTU/5111/1

I Jabatanarah Rekod dan Pencen

PEMBATALAN TAULIAH PEGAWAI-PEGAWAI TJP

1. Adalah dimaklumkan, tertakluk kepada perkenan DYMM Seri Paduka Baginda Yang Di Pertua Agong, Majlis Angkatan Tentera

di persidangan yang ke 249 pada 27 Mac 86 telah meluluskan supaya Tauliah yang di anugerahkan kepada. Pegawai-pegawai yang tersebut di bawah dibatalkan mengikut:

(a) Seksyen 9, 'Akta Angkatan Tentera 1972' tanpa mendapat apa-apa faedah pencen dan ganjaran.

(1) Lt (U) Abdul Salam bin Husin (371318) Lojistik.

(2) ...

(3) ...

(b) ...

2. Oleh itu. Departmen Tentera Udara telah menetapkan tarikh pembatalan tauliah bagi pegawal-pegawai, di atas pada 31 Mei 86.

3. Harap dapat pehak tuan mengeluarkan surat arahan dokumentasi pemberhentian pegawai-pegawai berkenaan kepada unit-unit yang berkenaan supaya urusan pemberhentian pegawai berkenaan dapat diambil tindakan seterusnya

4. Sekian untuk tindakan selanjutnya.

t.t xxxxxxxxxxxxxxxxxxxxxxx

ZULKAFLI BIN MOHD NOOR

MEJ (Udara). bp Panglima

Tentera Udara

[18] Upon perusal of the said letter, I agree with learned senior federal counsel that the letter was an internal communication sent on behalf of 'Panglima Tentera Udara' to the Record and Pension Department of the Ministry of Defence informing the department concerned of the Council's recommendation, which was subject to the assent of the Yang di-Pertuan Agong, to cancel the commission of the officers named therein, so that the department could take action to direct the relevant units to prepare the necessary documentation to facilitate the termination process. I find nothing in the said letter that can be construed as a notification to the appellant of the cancellation of his commission, or the termination of his service, as an officer of the armed forces as the letter was not addressed to the appellant.

[19] I also agree with the finding of the learned trial judge that the cancellation of the appellant's commission was made by the Yang di-Pertuan Agong in exercise of his powers under s 9 of the Act as evidenced by the said *Gazette* notification which, in so far as relevant, reads as follows:

No 5438 Adalah disiarkan untuk pengetahuan umum bahawa Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong dengan limpah kumia Baginda telah berkenaan supaya pegawai-pegawai berikut diberhentikan dari perkhidmatan Angkatan Tentera di bawah seksyen 9 Akta Angkatan Tentera 1972 mulai tarikh-tarikh yang dinyatakan.

Nama

Tarikh mulai

1 Jun 1986

.....

Cawangan Lojistik

Leftenan (Udara) Abdul Salam bin Hussain

.....

[20] The appeal on this ground must necessarily fail.

DECISION MAKING PROCESS, WHETHER FATALLY FLAWED

[21] The issue raised by learned counsel is related to the appellant's pleaded case that the Council has breached the rules of natural justice by not giving the appellant the opportunity to be heard before making the recommendation to cancel the appellant's commission to the Yang di-Pertuan Agong.

[22] Both Mr Karpal Singh and learned senior federal counsel agreed that the right accorded to a member the public service of not being dismissed without being given a reasonable opportunity of being heard pursuant to art 135(2) of the Federal Constitution did not apply to members of the armed forces. However, Mr Karpal Singh argued that before the Council made any decision to recommend to the Yang di-Pertuan Agong to cancel the appellant's commission pursuant to s 9 of the Act, the rules of natural justice demand that he should be given a reasonable opportunity to be heard of the grounds upon which the recommendation was based. It was contended that as no such opportunity was afforded by the Council to the appellant, the decision of the Yang di-Pertuan Agong to cancel the appellant's commission, or to terminate his service, is a nullity.

[23] In support of his submission, learned counsel cited the case of *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor* [1994] 3 MLJ 61, where Mohamed Dzaiddin SCJ (as he then was) adopted a passage in the speeches of Lord Bridge in *Bugdaycay v Secretary of State for Home Department* [1987] 1 All ER 940 to the effect that an

administrative decision shall be subject to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines.

[24] The learned trial judge on the facts of this case in rejecting a similar argument advanced before him said that art 132(1) read with art 135(2) of the Federal Constitution 'had deliberately omitted the armed forces for the purpose of conferring right of being heard to members of public service'. His Lordship was also of the view that the ratio decidendi in *Halimatussaadiah*'s case, has no application to the present case.

[25] The learned trial judge also relied on *Re Tufnell* (1876) 3 Ch D 161, where the facts of the case showed that Mr Tufnell was a military officer holding the rank of surgeon-major in Her Majesty's Army. He was stationed in Dublin as an assistant surgeon and was in charge of an existing prison. When the new military prison was completed he submitted his application for permanent appointment in the new prison. He succeeded in his application and was appointed to take permanent charge of the prison in 1846. In 1874 he was compulsorily retired on half pay at the age of 56. He challenged his compulsory retirement on the ground that he was appointed to his post during his life, or until incapacitated by infirmity or misconduct. In that case it was established that 'every officer in Her Majesty's army holds his office to the will of the Crown, and is liable to be dismissed at any moment without cause assigned'.

[26] I agree with the learned trial judge. In my view the power to cancel a commission of an officer under s 9 of the Act has to be read with art 132(2A) and 135(2) of the Federal Constitution. Article 132(2A) provides that every person who is a member of the services specified therein, including the armed forces, holds office during the pleasure of the Yang di-Pertuan Agong. It is implicit from the provision of art 135(2) that the restriction on the dismissal and reduction in rank of members of the public services without being given the right to be heard does not apply to members of the armed forces.

[27] With regard to the dismissal of an officer who holds office during the pleasure of the sovereign, in *Ridge v Baldwin* [1964] AC 65, Lord Reid said, at p 65:

> It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer he need not give anything.

[28] In this country, the common law prerogative for the sovereign to dismiss a member of the armed forces at pleasure was not affected by the

provisions of art 135(2) as the same does not apply to members of the armed forces. In fact s 9 of the Act sought to give effect to the common law principle of the right of the sovereign to dismiss a member of the armed forces at pleasure, at any time and without any reason. By reason thereof, I am satisfied that the learned trial judge had rightly applied the principle established in *Re Tufnell*, in dismissing the appellant's claim herein.

[29] From the authorities and the statutory provisions aforesaid, I am of the view that the exclusion of the members of the armed forces from being afforded the right to be heard under art 135(2) of the Federal Constitution applies to all stages of the termination process, including the proceedings before the Council. To hold otherwise would mean that the cancellation of a commission of a member of the armed forces could no longer be made without cause and without reason. It would also be contrary to the well established common law principle which is preserved by s 9 of the Act.

[30] Under the Act, the power to cancel the appellant's commission is vested in the Yang di-Pertuan Agong, and it is a right exercisable at his discretion at any time without assigning any reason. In the present case it has been established, vide the said *Gazette* notification, that the Yang di-Pertuan Agong had exercised the power conferred upon him and assented to the cancellation of the appellant's commission. In my view, once it has been so established, it is not open for the court to make further inquiry on the propriety of the said cancellation.

[31] Accordingly, the appeal is dismissed with costs. The decision of the learned trial judge is hereby affirmed. Deposit to the respondent to account for taxed costs.

[32] My learned sister Zaleha bt Zahari JCA and my learned brother Ahmad bin Maarop JCA have read this judgment in draft and have expressed their agreement with it.

Appeal dismissed with costs.

Reported by Kanesh Sundrum